(2) Supreme Court, U.S.
FILED

No. 00 895 NOV 29 2000

In The

Supreme Court of the United States

KEVIN WEDDERBURN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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KEVIN WEDDERBURN, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 99-2241

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2000 U.S. App. LEXIS 22446

August 31, 2000, Decided

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Original Opinion of June 1, 2000, Reported at: 2000 U.S. App. LEXIS 12011.

JUDGES:
Before Hon. RICHARD A. POSNER, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION:

Petition for Review of an Order of the Board of Immigration Appeals.

Order

Petitioner filed a petition for rehearing and petition for rehearing en banc on July 17, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Kevin Wedderburn, Petitioner,

v.

Immigration and Naturalization Service,
Respondent.

No. 99-2241

United States Court of Appeals
for the Seventh Circuit

Argued Jan. 5, 2000.

Decided June 1, 2000.

COUNSEL:
For KEVIN WEDDERBURN, Petitioner: Lauren L. McFarlane, LEGAL ASSISTANCE FOUNDATION OF CHICAGO, Chicago, IL USA.

For IMMIGRATION AND NATURALIZATION SERVICE, Respondent: Samuel Der-Yeghiayan, IMMIGRATION & NATURALIZATION SERVICE, Chicago, IL USA. Doris Meissner, IMMIGRATION AND NATURALIZATION SERVICE, Office of the General Counsel, Washington, DC USA. Gretchen M. Wolfinger, DEPARTMENT OF JUSTICE, Washington, DC USA.

JUDGES:
Before Posner, Chief Judge, and Easterbrook and Ripple, Circuit Judges.

Easterbrook, Circuit Judge.

Children born outside the United States, of alien parents, acquire U.S. citizenship automatically if before their eighteenth

birthday they move to the United States, and one or both of their parents become U.S. citizens. Section 321(a) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a). Kevin Wedderburn, who was born in Jamaica of Jamaican parents, contends that he became a citizen on June 2, 1993, four months before his eighteenth birthday, when his father Fitzroy Wedderburn became a naturalized United States citizen. Immigration officials, by contrast, believe that Kevin is not a U.S. citizen because his mother, Julie Hines, remains a citizen of Jamaica. Kevin has been ordered deported because of his criminal record (he was sentenced to six years' imprisonment in 1995 for aggravated sexual assault of a boy under nine years of age), and if Kevin is an alien that criminal conviction not only supports removal but also forecloses all avenues of discretionary administrative relief and judicial review. But a person ordered removed is entitled to review of the questions whether he is an alien, and whether he committed a felony requiring removal. *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997). *See also, e.g., Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999). Kevin does not deny that his criminal conviction requires removal, if he is an alien. (It is irrelevant for current purposes whether that conviction is best classified under 8 U.S.C. § 1101(a)(43)(A), as "sexual abuse of a minor", or § 1101(a)(43)(F), as a "a crime of violence . . . for which the term of imprisonment [is] at least one year".) Thus everything turns on citizenship: if Kevin is a citizen, the order of deportation must be set aside, but if he is not a citizen we must dismiss his petition for want of jurisdiction.

Kevin was born in Jamaica on October 30, 1975. His parents were not married and did not marry each other later--though on June 5, 1986, Fitzroy added his name to Kevin's birth certificate as the father, which under Jamaican law means that Kevin is a legitimate child. Before legitimating Kevin, Fitzroy moved to the United States and married. His wife, Velma, became a U.S. citizen in 1986 and filed a petition for a visa that would allow Kevin to live in the United States. When he was

eleven, Kevin came to the United States, but after three years in New York with Fitzroy and Velma, he moved to Illinois to live with his paternal grandmother.

Whether these events made Kevin a citizen depends on § 321(a), which reads:

> A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
>
> (1) The naturalization of both parents; or
>
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
>
> (4) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

Kevin meets the conditions in clauses (4) and (5), so he is a citizen if any one of clauses (1) to (3) applies. Julie Hines has not naturalized, so he does not satisfy clause (1). Nothing in the record suggests that Julie has died, so Kevin does not satisfy

clause (2). Clause (3) offers two options. Kevin does not satisfy the latter, involving his mother's naturalization, not only because Julie has not become a U.S. citizen but also because his paternity has been established by legitimation. He does not meet the former option, involving naturalization of the parent with legal custody, because his parents have not undergone "a legal separation" and it is unclear whether Fitzroy had "legal custody" of Kevin at the time. His residence at the time of Fitzroy's naturalization was with his paternal grandmother, so the BIA's conclusion that one parent's permanent physical custody with the other's consent is "legal custody" does not assist Kevin. *See Matter of M--*, 3 I. & N. Dec. 850 (1950). Kevin does not meet the requirements of § 321(a).

Kevin asks us to read § 321(a)(3) to treat him as a citizen notwithstanding his inability to meet the statutory conditions. His argument draws on what he believes is a statutory incongruity. Section 101(c)(1), 8 U.S.C. § 1101(c)(1), which defines the term "child" for purposes of Title III of the Act (which comprises § 321), includes legitimated and adopted children in the set eligible for citizenship.

> The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile . . . if such legitimation or adoption takes place before the child reaches the age of 16 years . . . , and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

According to Kevin, he is a "child" under this definition, so § 321(a)(3) should be read to deem him a citizen. The premise of this argument is incorrect; he is not a "child" under § 101(c)(1), because he was not in Fitzroy's custody at the time of the legitimating event. In June 1986, when Fitzroy legitimated Kevin by adding his name to Kevin's birth certificate, Fitzroy was living in New York, while Kevin was living in Jamaica

with one of his grandmothers. But even if Kevin were a "child" under §101(c)(1), this would not by itself make him a citizen. Section 101 defines terms; the substantive requirements of citizenship appear elsewhere in the Act. Only with respect to § 322, 8 U.S.C. § 1433, which permits a U.S. citizen parent to obtain citizenship for a "child" in his "legal custody," does the definition have independent significance. (Fitzroy has not sought to confer citizenship on Kevin via § 322.) Both § 101(c)(1) and § 321(a) equate legitimated children to legitimate ones. Kevin's problem is not the nature of this equation, but the fact that he does not qualify under § 321(a) whether he is "illegitimate," "legitimated," or "legitimate." The label does not make a difference, because Julie Hines is alive (we must assume) and has not become a U.S. citizen, and Kevin has never been in his father's "legal custody [after] there has been a legal separation of the parents". Putting § 101 together with § 321 does not help Kevin, and appealing to the statutes' spirit, as Kevin does, does not alter the statutes' language.

We may assume, as Kevin insists, that, when § 321(a) was enacted, the predominant, if not the exclusive, means of legitimating an illegitimate child was the parents' subsequent marriage. When legitimation equals marriage, then a dissolution will produce "legal separation" and "legal custody", so that legitimated children can take full advantage of the first possibility under § 321(a)(3). When some foreign nations made it possible to legitimate a child without marriage, or indeed abolished the distinction between legitimate and illegitimate children, this created the possibility that the legitimated child could not use § 321(a)(3)'s first clause. Kevin sees this as a "gap" that we should close; but it is not a proper function of interpretation (as opposed to amendment) to ensure that every development in foreign law has a corresponding benefit under U.S. law. Kevin has the same options he and others like him possessed before Jamaica amended its law in 1976 to treat persons in his position as legitimate--Fitzroy's signature on the birth certificate did more to affect his status as a recognized

father than to alter Kevin's status under Jamaican law--the amendment of Jamaican law does not have any significance for the proper interpretation of § 321(a)(3).

At oral argument, the judges and counsel explored two different, and perhaps more promising, ways of approaching § 321(a). One possibility is that "legal custody" and "legal separation of the parents" have a technical meaning, perhaps by incorporating Jamaican law, that enables Kevin to satisfy 321(a)(3). The other is that Congress acted irrationally, and thus unconstitutionally, by requiring both "legal custody" and "legal separation." The parties submitted post-argument memoranda concerning the first of these possibilities. These memoranda show that Kevin did not raise either line of argument before the Board of Immigration Appeals, or for that matter in his appellate briefs, so they have been waived. But we cover them briefly nonetheless, if only to show that Kevin's deportation is not the result of a blunder by his lawyers.

"Legal custody" and "legal separation of the parents", as words in a federal statute, must take their meaning from federal law. On this both sides agree. But federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms. *Matter of H--*, 3 I. & N. Dec. 742 (1949), concludes that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. It is thus apparent that the term "legal separation," can refer only to a situation where there has been a termination of the marital status. Since the subject's parents were not lawfully joined in wedlock, they could not have been legally separated. 3 I. & N. Dec. at 744. The last line of this quotation supposes, however, that Jamaican law limits "a limited or absolute divorce obtained through judicial proceedings" to situations in which a marriage is being dissolved. Because the INS determines the existence, validity, and dissolution of wedlock using the legal rules of the place where the marriage was performed (or dissolved), *see DeSylva v. Ballentine*, 351 U.S.

570, 580-82, 100 L. Ed. 1415, 76 S. Ct. 974 (1956); [**10] *Matter of Miraldo*, 14 I. & N. Dec. 704 (1974); *Matter of M--*, it is at least possible that Jamaica permits unmarried persons to obtain a "legal separation" and an award of "legal custody" of the children. But Kevin's lawyers concede that, after a diligent search, they could not find any Jamaican law to that effect. They represent that marriage in Jamaica is a formal subject (Jamaica does not, for example, recognize common-law marriage) and that legal separation is limited to persons who have been married. In this respect, at least, Jamaican law tracks the expectation voiced in *Matter of H--*, so Kevin asks us to reject the whole approach of *Matter of H--* and to treat not only the definition of the words in § 321(a)(3), but also their referents, as matters of federal law. Many federal statutes now prescribe some rules of family law; for example, 1 U.S.C. § 7 defines marriage, wherever that term appears in the United States Code, as "a legal union between one man and one woman as husband and wife". *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. Rev. 1297 (1998) (describing other national resolutions of family-law matters). Section 321(a) is just one more example of the displacement of local law, Kevin insists.

That does not get Kevin very far if we understand "legal separation" normally. See Black's Law Dictionary 1369 (7th ed. 1999) (defining "separation" as "an arrangement whereby a husband and wife live apart from each other while remaining married, either by mutual consent or by judicial decree; the act of carrying out such an arrangement. Also termed legal separation; judicial separation."). Just as *Matter of H--* says, domestic relations law in the United States treats "legal separation" as the judicial suspension or dissolution of a marriage. Kevin asks us to give it a completely different meaning, equating "legal separation" with "not being legally joined." Under this definition, Fitzroy Wedderburn and Julie Hines were "legally separated" from the moment they met (indeed, were "legally separated" before they met). Fitzroy

would be "legally separated" from more than six billion people: everyone on the planet other than his wife. That is not a plausible interpretation of "legally separated," however, first because it leaves no work for "legally" (a word that in a construction like this usually refers to a judicial decree), and second because it is impossible to see how people who have never been joined can be separated. Separation implies a comparison to a former state of joinder. South America and Africa have been "separated" because they were once joined in Pangaea and Gondwanaland; but Hawaii, although separate from the continental United States, has never been "separated" from it. At all events, the BIA did not exceed its delegated powers when reading "legally separated" as drawing a distinction between cohabitation in marriage and a later state of living apart (with or without divorce); reading a phrase just as Black's Law Dictionary does can not be described as excessively freewheeling interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

What then of the possibility that § 321(a)(3) is irrational because it requires proof of both "legal custody" and "legal separation"? Because the conjunction of "legal separation" with "legal custody" does not concern any suspect class, a rational basis is enough to defeat a constitutional challenge. It is not hard to think of a basis. Many legally separated parents share custody of their children. Congress did not have to treat divorce (or any other form of legal separation) as the equivalent of one parent's death; § 321(a) as written means that in shared-custody cases both parents must naturalize, and this is entirely rational. As for the reverse--legal custody in the naturalizing parent, but not legal separation of the parents--this situation can come about when one parent has been deemed unfit to have custody, perhaps because of mental or medical conditions, or is physically unable to have custody (perhaps because of incarceration). Often these conditions will pass, and the parents will resume living together with joint custody of the child. Congress

rationally could conclude that as long as the marriage continues the citizenship of the children should not change automatically with the citizenship of a single parent. After all, gaining U.S. citizenship by naturalization means disavowing one's original citizenship. 8 U.S.C. § 1448(a)(2). (Usually disavowal means losing the original citizenship, though some foreign nations believe that citizenship acquired at birth cannot be lost, and hence treat naturalized U.S. citizens as dual nationals.) Both the child and the surviving but non-custodial parent may have reasons to prefer the child's original citizenship, which may affect obligations such as military service and taxation. Section 321(a) limits automatic changes to situations in which the other parent has been removed from the picture--either by death or by "legal separation." In a small subset of the cases in which there is legal custody it may prove impossible to meet the legal-separation requirement even in the long run--perhaps because a child was legitimated without marriage, perhaps because the nation with jurisdiction over the marriage does not recognize divorce or legal separation. *See Matter of Miraldo*. But for these cases § 322 permits the custodial parent to obtain U.S. citizenship for his or her child as a matter of right, by filing an application. A law does not become unconstitutional just because it does not fit 100% of the cases; mismatches between legal rules and the world at large are inevitable. *E.g., Califano v. Jobst*, 434 U.S. 47, 54 L.Ed. 2d 228, 98 S. Ct. 95 (1977). But § 321(a) is a mismatch for a custody-but-not-legal-separation situation only when read independently of 322, which would be unsound.

Although Kevin does not contend that § 321(a)(3) is irrationally arbitrary, he has waged a vigorous constitutional challenge on other grounds. Relying on *Miller v. Albright*, 523 U.S. 420, 140 L. Ed. 2d 575, 118 S. Ct. 1428 (1998), he contends that § 321(a)(3) violates the equal protection component of the fifth amendment's due process clause. According to Kevin, the statute "creates an invidious classification between naturalized mothers of illegitimate children, who can pass on the benefit of citizenship, and naturalized fathers of legitimated children, who

cannot." Miller concerned the constitutionality of 8 U.S.C. § 1409, which provides that illegitimate children inherit the citizenship of their mothers, while fathers can transmit U.S. citizenship to offspring only if additional conditions are satisfied. Three groups of two Justices apiece made up the majority, and Lorelyn Miller, the person claiming citizenship through her father, lost in the end. But Kevin believes that we can patch different groups of Justices together to produce a majority for him:

> Under the reasoning adopted by five Justices of the Supreme Court in Miller . . . , Kevin Wedderburn has third-party standing to challenge this gender-based classification. [See 523 U.S. at 431-33 (Stevens, J., joined by Rehnquist, C.J.), 473-74 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).] Under the reasoning of another group of five Justices . . . , a gender-based distinction like the one in INA § 321(a)(3) is subject to heightened or intermediate scrutiny, which requires that the distinction be tailored to protect an important state interest. [See 523 U.S. at 451-52 (O'Connor, J., joined by Kennedy, J.), 476-81 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).] Because the gender-based classification in INA § 321(a)(3) lacks any justification, the statute violates the parental right to equal protection under the Constitution.

Kevin's supposition that we can put together two concurring opinions with one dissenting opinion to produce a five-Justice majority on each contested issue overlooks the way the Justices counted votes in *Miller* itself. How votes should be aggregated on appellate courts is an interesting and debatable question. See Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 Sup. Ct. Econ. Rev. 87 (1999). How votes were counted in *Miller* (and thus how an inferior court should predict that they will be counted in a similar future case) can be determined by inspection.

Miller needed to win on each of three issues: standing, redressability, and the merits. She lost two votes on each, and thus lost a total of six votes and the case. Justices O'Connor and Kennedy believed that only the father has standing, for the right to pass citizenship to one's children belongs to the father and not the child. 523 U.S. at 445-51. "The statute . . . accords differential treatment to fathers and mothers, not to sons and daughters." Id. at 445. That is equally true of § 321(a)(3). Justices Scalia and Thomas believed that even if the statute at issue in Miller were unconstitutional, no remedy would be available because "the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress." 523 U.S. at 453. That, too, is equally true of § 321(a)(3). Finally, Chief Justice Rehnquist and Justice Stevens believed that the rational-basis test applies to statutes such as § 1409, and that a distinction between citizen fathers and citizen mothers of illegitimate children is rationally related to legitimate governmental objectives. 523 U.S. at 433-45.

None of the six Justices who voted against Miller suggested that a constitutional challenge to § 321(a)(3) would receive more favorable consideration, unless presented by the father. And the three dissenting Justices implied that a person in Kevin's position could lose even their votes. Justice Breyer explained that his view on standing was influenced by the fact that Lorelyn's father, Charlie Miller, tried to sue in his own name, only to have his suit dismissed for lack of standing. By obstructing Charlie's suit, Justice Breyer concluded, the Department of Justice enabled Lorelyn to litigate. 523 U.S. at 473-74 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting). Fitzroy Wedderburn, by contrast, has not sought to bestow citizenship on Kevin. Justice Breyer also thought it important to both redressability and the merits that Lorelyn claimed a right to citizenship at birth. He distinguished situations in which events after birth affect citizenship. Id. at 475, 481, 488-89. Kevin Wedderburn could not count on Justice Breyer's support.

We have been supposing so far that § 321(a)(3) implements a form of sex discrimination. That would be so if Kevin were illegitimate. Then Julie Hines, but not Fitzroy Wedderburn, could make Kevin Wedderburn a U.S. citizen by naturalization. But Jamaica now deems Kevin legitimate, and § 321(a) treats him the same way. The second option of § 321(a)(3) drops out. Legitimated children become citizens if both parents naturalize, if the surviving parent naturalizes, or if the parent having "legal custody" naturalizes following the parents' "legal separation." Nothing depends on the sex of the parent (or parents) who naturalize or have custody.

To see this, suppose that Julie Hines had moved to the United States with Kevin, while Fitzroy Wedderburn had remained in Jamaica, and that Julie later naturalized. Julie's immigration and naturalization would not have affected Kevin's citizenship because the second option under § 321(a)(3) does not apply to legitimated children. By equating legitimated and legitimate children in both § 101(c)(1) and § 321(a), Congress avoided the kind of discrimination about which Kevin complains. An illegitimate child who has never been legitimated would have a claim (though in light of *Miller* it would not be a strong one); but a legitimated child such as Kevin has no sex-discrimination claim at all. Perhaps this explains the odd locution of Kevin's core argument, which we have already quoted: that § 321(a)(3) "creates an invidious classification between naturalized mothers of illegitimate children, who can pass on the benefit of citizenship, and naturalized fathers of legitimated children, who cannot" (emphasis added). In this formulation, legitimation and not sex makes the difference. Anyway, the premise of Kevin's contention is untrue. A father of a legitimated child automatically passes citizenship to the child, if the mother also becomes a citizen, or has died, or if the father acquired "legal custody" of the child following a "legal separation" from the mother. A father also may pass citizenship to a legitimated child in his "legal custody" by applying for a certificate of citizenship under § 322.

Kevin does not contend that Congress violated the Constitution by equating legitimated and legitimate children, and no such contention would be tenable. The second clause of § 321(a)(3) does not discriminate against illegitimate children; instead it gives them an extra route to citizenship, one not enjoyed by legitimate (or legitimated) offspring. In the end, the nub of Kevin's argument must be that Fitzroy legitimated him on the cheap: by acknowledging his status as Kevin's parent rather than by marrying his mother, a step that (given Jamaican law) made the first option of § 321(a)(3) unavailable to him. Fitzroy could have compensated by using § 322, which permits a citizen who has a child in his "legal custody" to obtain citizenship for a child without regard to "legal separation" from the other parent--though this may not have been possible, since Kevin was not in Fitzroy's custody at the time of the legitimating event. Kevin himself, as a lawful permanent resident, could have applied for citizenship. But none of these things happened, and we have already explained why the Constitution does not require Congress to anticipate and accommodate every possibility created by foreign matrimonial law.

Kevin is not a citizen of the United States, so his petition for review is DISMISSED.

U.S. Department of Justice

Executive Office for Immigration Review
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April 19, 1999

WEDDERBURN, KEVIN
A#: 41-362-089

Enclosed is a copy of the board's decision an order in the above-referenced case.

Very Truly Yours,

Paul W. Schmidt
Chairman

Enclosure

Panel Members:

HURWITZ, GERALD S.
MORRIS, JAMES P.
SCIALABBA, LORI L.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

File A41 362 089 - Chicago Date APR 19 1999

In re: KEVIN WEDDERBURN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa Palumbo, Esquire
Legal Assistance Foundation
of Chicago
111 W. Jackson Blvd.,
Third Floor
Chicago, Illinois 60604-3502

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. & § 1251(a)(2)(A)(iii) - Convicted of aggravated felony

APPLICATION: Termination of proceedings

In a decision dated August 19, 1998, an Immigration Judge found the respondent deportable as charged and determined that the respondent was ineligible for relief from deportation. The respondent has appealed the Immigration Judge's decision. The appeal will be dismissed.

The respondent is a native of Jamaica who entered the United States as a lawful permanent resident on October 9, 1987. The record reflects that the respondent was born out of wedlock

on October 13, 1975, to Julie Hines and Fitroy Wedderburn, both of whom were citizens of Jamaica at the time. Thereafter, Fitzroy Wedderburn came to the United States and married Velma Wedderburn, a United States citizen. On June 5, 1986, the respondent's father's name was added to the respondent's birth registration form (Exh. 3), thereby legitimating the respondent in accordance with the Status of Children Act of 1976. On October 9, 1987, the respondent was admitted to the United States as a lawful permanent resident based upon an immediate relative visa petition filed on his behalf by his stepmother (Exh. 4). One June 2, 1993, when the respondent was 17 years old, his father became a naturalized United States citizen. The respondent's mother, Julie Hines, has never naturalized.

On January 25, 1995, the respondent was convicted in the Circuit Court of Cook County, Illinois for the offense of aggravated criminal sexual assault, in violation of Chapter 38, section 12-14B(2) of the Illinois revised Statutes. For this offense, he was sentenced to a term of imprisonment of 6 years. On the basis of this conviction, the Immigration and Naturalization Service ("Service") issued an Order to Show Cause (Form I-221), charging the respondent with deportability under section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C & 1251(a)(2)(A)(iii) (Supp. II 1996), for having committed an aggravated felony. At a hearing before the Immigration Judge, the respondent, through counsel, admitted to all of the factual allegations contained in the Order to Show Cause, with the exception of the allegation that the respondent is a citizen of Jamaica (Tr. At 28-29). In this regard, the respondent asserted that he had derived citizenship from his father, who had naturalized before the respondent reached the age of 18. The Immigration Judge then continued the hearing to permit the respondent to file an Application for Certificate of Citizenship (N-600) withe the Service. The application was denied on March 3, 1998.

After concluding that the respondent had not established derivative citizenship under section 321(a) o the Act, 8 U.S.C & 1432(a), the Immigration Judge found that the respondent's conviction for aggravated criminal sexual assault constitutes an aggravated felony as defined at section 101(a)(43)(F) of the Act, 8 U.S.C. & 1101(a)(43)(F), as "crime of violence (as defined in section 16 of Title 18, United States Code. . .), for which the term of imprisonment is at least one year."[1] The Immigration Judge properly concluded that this conviction rendered the respondent ineligible for a waiver of inadmissiblity under section 212(c) of the Act, 8 U.S.C. & 1182(c) (1994), as a result of amendments made by section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). *See also Matter of Soriano*, Interim Decision 3289 (A.G.. Feb. 21. 1997).

On appeal, the respondent contends that the Service has not established by clear, convincing and unequivocal evidence that he is an alien (Br. At 5). The burden of proof in establishing alienage in deportation proceedings rests with the Service.

---

[1] Section 101(a)(43)(F) of the Act was amended by section 321(a)(3) of the Illegal Immigration Reform Responsibility Act of 1996, Div. C., Department of Defense Appropriates Act, 1997, Pub. L. 104-208, 110 Stat. 3009-627 ("IIRIRA"). The new definition applies to convictions entered before, on , or after the date of enactment, notwithstanding any other effective date provision. Section 321(b) of the IIRIRA, 110 Stat. at 3009_628; *see also Matter of Batista -Hernandez*, Interim Decision 3321, at 10 (BIA 1997). Furthermore, although the Service does not specify in the Order to Show Cause, nor does the Immigration Judge specify in her written decision, under which subsection of section 101(a)(43) of the Act the respondent's offense should be classified, we agree with the Immigration Judge's finding as explained in the transcript that the applicable subsection is section 101(a)(43)(F) of the Act. (TR. At 37).

United States ex rel. Bilokumsky v. Tod., 263 U.S. 149 (1923); *United States v. Neely*, 281 (7th Cir. 1953). However, once birth in a foreign country has been established, a presumption of alienage arises, and the burden shifts to the respondent to establish United States citizenship. *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977). The respondent admits, and his birth certificate confirms, that he was born in Jamaica (TR. At 7; Exh. 3; Br. At 1). Therefore, we find that the Service has met its burden to establish the respondent's alienage.

On appeal, the respondent also reiterates his argument that he has derived citizenship through his naturalized father under section 321(a) of the Act. We disagree. Section 321(a) of the Act provides as follows:

A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother of the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes places while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of

this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years (emphasis added).

The respondent emphasizes that although he was born out of wedlock, he was legitimated by his father before the respondent was 16 years old, and his father naturalized before the respondent was 18 years old. Despite these actions, however, the respondent cannot derive citizenship under section 321(a) of the Act, as his mother has not naturalized. The respondent argues that "even if the term 'father' is not specifically stated in the statute" at section 321(a)(3), it should be read to "include a situation, like respondent's where the child was born out of wedlock but it is the father from whom the child acquires citizenship, not the mother" (Br. At 7). Otherwise, he contends, the statute would violate the Equal Protection Clause of the United States Constitution. In support of his argument, he cites to *Miller v. Albright*, 523 U.S. 420 (1998), in which the Supreme Court upheld the constitutionality of section 309 of the Act which requires additional proof of paternity to establish citizenship by birth where the citizen parent of a child born abroad and out of wedlock is the child's father, as opposed to the mother. However, that case is not controlling in the instant matter, as it does not address the constitutionality of section 321(a) of the Act. Furthermore, it is well-settled that the Board lacks the authority to rule on the constitutionality of the laws it administers. *See e.g.*, Section 103 of the Act, 8 U.S.C. & 1103 (1994); *Matter of Fuentes-Campos*, Interim Decision 3318, at 10 (BIA 1997); *Matter of C-*, 20& I&N Dec. 529, 532 (BIA 1992); *Matter of Anselmo*, 20 I&N Dec. 25, 30 (BIA 1989). Accordingly, the appeal will be dismissed.

Order: The respondent's appeal is dismissed.

(S/Signature for the Board)

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
Chicago, Illinois

File No.: A 41 362 089 August 19, 1998

In the Matter of
Kevin Wedderburn, In Deportation Proceedings
Respondent

Oral Decision of the Immigration Judge

Based upon your admissions based upon what has been marked as Exhibit 1A, 2, 3, 4, and Exhibit 5, based upon a careful review of the specific provisions of the Immigration and Nationality Act, to wit, Section 321(a), Section 309, and Section 101(c), I find that you are not a native or citizen of the United States. I find that there is no express statutory provision in the instant case and therefore based upon careful review of all of the evidence presented to the Court and considering the argument presented by your counsel, I cannot make the finding that you are a citizen of the United States.

Because of the Illegal Immigration and Immigrant Responsibility Act of 1996, you are statutorily ineligible to apply for any form of relief from deportation, and I have no choice but to order that you be deported from the United States. Therefore, I hereby order that you be deported from the United States to Jamaica on the charges contained in the Order to Show Cause.

s/Renetta Smith
Immigration Judge
A 41 362 089 August 19, 1998

(Seal)

U.S. Department of Justice
Immigration and Naturalization Service

Office of Administrative Appeals
425 Eye Street N.W.
ULLB, 3rd floor
Washington, D.C. 20536

Kevin Anthony Wedderburn
2427 Morgan Point Blvd.
Kissimmee, FL 34743

File: A41 362 089 Office: Chicago Date: Aug. 13, 1998

Application: Application for Certificate of Citizenship under § 341(a) of the Immigration and Nationality Act, 8 U.S.C. § 1452(a)

On Behalf of Applicant: Self-represented

Instructions:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

(Continuation of page 1)

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petition. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

For the Associate Commissioner Examinations,

s/Terrance M. O'Reilly, Director
Administrative Appeals Office

(Page 2)

Discussion: The application was denied by the District Director, Chicago, Illinois, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on October 30, 1975, in Jamaica. The applicant's father Fitzroy Wedderburn, was born in Jamaica on January 26, 1946, and became a naturalized U.S. citizen on June 2, 1993. His mother, Julie Hines, was born in 1958 in Jamaica and never became a United States citizen. The applicant's parents never married. The applicant was lawfully admitted for permanent residence on October 9, 1987, on the basis of an approved immediate relative visa petition filed by his step-mother. He claims eligibility for a certificate of citizenship under § 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432, as a child born outside of the United States of an alien parent having legal custody of the child when there has been a legal separation of the parents who subsequently naturalized while the child us under the age of 18 years.

Section 321 (a) of the Act provides, in pertinent part, that:

A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions, and it is immaterial which of the actions occurred last:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the

naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while said child is under the age of 18 years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United State while under the age of 18 years.

The record establishes that (1) his father became a naturalized U.S. citizen prior to the applicant's 18th birthday, (2) his father acknowledged him at least prior to the applicant's lawful admission at the age of approximately 12 years of age, (3) the applicant became the beneficiary of an approved visa petition filed by his step-mother, and (4) the applicant was residing in the United States in his father's legal custody as a lawful permanent resident when his father naturalized.

However, in order for the applicant to receive the benefit of § 321 of the Act, there must have been a legal separation of the parents. Matter of H –, 3 I & N Dec. 742 (C.O. 1949), held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings, and where the actual parents of the child were never lawfully married, there could be no "legal separation," of such parents. Therefore, the applicant's father was not legally separated from the mother when his father naturalized. If the parents were never lawfully married, there can be no legal separation, as such, and acknowledgment by a naturalized parent under such circumstances does not result in derivation of U.S. citizenship even though other requisite conditions are satisfied. See INTERP. 320.1(a)(6).

There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization. Therefore, the district director's decision will be affirmed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

ORDER: The appeal is dismissed.

UNITED STATES DEPARTMENT OF JUSTICE
THE IMMIGRATION AND NATURALIZATION SERVICE
401 SOUTH STATE STREET, SUITE 800
CHICAGO, ILLINOIS 60605

KEVIN ANTHONY WEDDERBURN A 41 362 089
C/O FITZROY WEDDERBURN DATE: 3/3/1998
31-19-106ST. EAST
ELMHURST, N.Y. 11369

DECISION

Upon consideration, it is ordered that your Application for Certificate of Citizenship N-600) be denied for the following reasons:

SEE ATTACHED

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 30 days from the date of the notice, (33 days if this notice was received by mail.) If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

___ Board of Immigration Appeals in Washington, D.C., on the enclosed Form EOIR-29. (A fee of $110.00 is required).

__X__ Commissioner on the Enclosed Form I-290B. (A fee of $110 is required).

If an appeal is desired, the Notice of Appeal shall be executed and filed with the District Office at 10 W. Jackson Blvd., Chicago, IL (Second floor) together with the required fee. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any questions which you may have will be answered by

(Continuation of page 1)

the local immigration office nearest your residence, or at the address in the heading of this letter.

Sincerely yours,

s/Brian R. Pearlman
District Director

Enclosure(s) M-188
Form I-290B

(Page 2_
A 41 362 089

The instant application (Form N-600) requesting issuance of a Certificate of U.S. Citizenship, pursuant to the provisions of Section 3419a) of the Immigration and Nationality Act, as amended, was received at this office on 02/23/98, claiming United States citizenship through your father by virtue of Section 321(a)(1) of the Act. The fee was waived by the authority of the District Director for the Chicago INS office; and the application was approved for an expedited interview by the Assistant District Director for Examinations. The application will be denied.

Section 321(a) (1) of the Immigration Act as amended states, in part, that: "A child born out side of the United States of alien parents. Or of an alien parent and citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
(1) The naturalization of both parents; or,
(2) The naturalization of the surviving parent if one of the parents is deceased; or
(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
(4) Such naturalization takes place while such child is under the age of eighteen years . . ."

A review of the record indicates that you entered the U.S. on Oct. 09. 1987 as the beneficiary of an approved I-130 petition (executed by your stepmother). Your father naturalized on 06/02/93 while you were at the age of seventeen. However, you stated at your interview on 02/27/98 that you were born out of wedlock. Furthermore, your immigrant visa file contains a copy

of your birth certificate with no information concerning your father (thus, attesting to an illegitimate birth.) Alth9ugh your natural father did naturalize on 06/02/93, you cannot automatically acquire U.S. Citizenship because § 321(a)(3) of the Act only allows for the acquisition of U.S. Citizenship through the mother for children born out of wedlock.

This decision is without prejudice to your filing for any other benefit under the Immigration and Nationality Act.

LETTER OF JULIE HINES

Lot 458 Hallandale Dr. West
Passage Fort
Gregory Park P.O.
St. Catherine
Jamaica West Indies

The Immigration Nationalization Dept.
New York, New York

Dear Sir/Madam

I Julie Hines of the above address swear that Fitz Roy Wedderburn now living in the United States at this address 102-26-29 Ave East, Elmhurst New York 11369 is the father of my son Kevin Wedderburn who was born on the 30th,10,75.

It is my intension to relinquish custody of my son to his father and stepmother who are in the United States for permanent resident.

Sincerely yours

Julie Hines

S.T. Acuttes J.P.
Trelawny
13/8/82

S.T. Gentles, J.P.
Trelawny

Notice of Custody Determination

U.S. Department of Justice
Immigration and Naturalization Service

File No: A 41-362-089
Date: March 12, 1998

Kevin
WEDDERBURN

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the Immigration Judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

- ☐ detained in the custody of this Service.
- ☐ released under bond in the amount of $____
- ☐ released on your own recognizance.

- ☒ You may request a review of this determination by an Immigration Judge.
- ☐ You may not request a review of this determination by an Immigration Judge because the Immigration and Nationality Act prohibits your release from custody.

Diane Esbrook
(Signature of authorized officer)

Deputy Asst. District Director for Deportation
(Title of authorized officer)

Chicago, Illinois
(INS office location)

☒ do ☐ do not request a redetermination of this custody decision by an Immigration Judge.
☒ I acknowledge receipt of this notification.

Wedderburn 3/12/98
(Signature of respondent) (Date)

Bottom of same page:

RESULT OF CUSTODY REDETERMINATION

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director ☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:
☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to _____

☐ Release - Order of Recognizance.
☐ Release - Personal Recognizance.
☐ Other: _____